

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 3 O'clock 15 min P M
Date 11-26-03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

In the matter of:

SAVANNAH YACHT CORPORATION

Debtor

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Chapter 7 Case

Number 03-41547

**ORDER ON DEBTOR'S MOTION TO REQUIRE PETITIONING
CREDITOR TO POST BOND**

Before the Court is the involuntary Debtor's Motion to Require Petitioning Creditor to Post Bond Pursuant to 11 U.S.C. § 303. Debtor asserts that Petitioner, M.H. Yacht Sales, Inc., filed this involuntary petition in bad faith; therefore, the Court should require Petitioner to post bond in the amount of \$15,000.00. Debtor asserts that the involuntary petition was filed in bad faith because Debtor has twelve or more creditors and the involuntary petition was not joined by at least three creditors. Debtor also asserts that Petitioner's claim is disputed thus, Petitioner is not qualified to commence an involuntary bankruptcy. Petitioner contends that there was no bad faith in that it exercised careful due diligence prior to the filing and discovered fewer than twelve creditors and it does not believe that the existence of the claim is subject to dispute.

This Court has jurisdiction over this matter pursuant to 28 U.S.C § 157.

Having considered the arguments and written submissions of counsel and applicable case

(51)

law, I make the following Conclusions of Law.

CONCLUSIONS OF LAW

At issue in the proceeding is 11 U.S.C. § 303(e) which states, “After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.” Section 303(e) references § 303(i) which allows the court to grant judgment for damages against any petitioner that filed in bad faith; therefore, bad faith is a determining factor in ordering a petitioning creditor to post a bond under § 303(e). *See, e.g., Hutter Associates v. Women, Inc. (In re Hutter Associates)*, 138 B.R. 512, 516 (W.D. Va. 1992)(noting that failure to prove that petition filed in bad faith precludes imposition of bond).

Courts have adopted different approaches to determine whether a petition was filed in bad faith. *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1501 (11th Cir. 1997). For example, some courts utilize an “improper purpose test” in which bad faith exists when the petition was motivated by ill will, malice, or for the purpose of embarrassing or harassing the debtor. *Id.* (citing *In re Camelot Inc.*, 25 B.R. 861, 864 (Bankr. E.D. Tenn. 1982)). Other courts apply an “improper use” test under which bad faith exists when petitioner’s actions are an improper use of the Bankruptcy code as a way to avoid customary collection procedures. *Id.* (citing *In re Better Care, Ltd.*, 97 B.R. 405, 410 (Bankr. N.D. Ill. 1989)). Finally, other courts analyze bad faith under Bankruptcy Rule

9011 which requires both a subjective inquiry into the filing and an objective inquiry into the facts and the law. Id. at 1502. In General Trading, the Eleventh Circuit declined to determine which approach is correct.

Much like the Court in General Trading, this Court need not decide which is the correct approach to determine bad faith, because Debtor failed to satisfy its burden of proof under any of the tests. "It is well established that good faith is presumed on the part of the party or parties filing an involuntary petition and that the burden of proving bad faith rests on the objecting party. This burden is a significant one, as the objecting party must prove bad faith by at least a preponderance of the evidence." In re CLE Corp., 59 B.R. 579, 583 (Bankr. N.D.Ga. 1986)(citations omitted). *See also* U.S. Fid. & Guar. Co. v. DJF Realty & Suppliers Inc., 58 B.R. 1008, 1011 (N.D.N.Y. 1986)(noting it is clear that there is presumption of good faith in favor of petitioning creditor).

Debtor did not present evidence that Petitioner failed to exercise due diligence in filing the involuntary petition or that Petitioner's filing was motivated by ill will, malice or for the purpose of embarrassing or harassing the Debtor. Furthermore, Debtor presented no evidence that Petitioner filed this action as a substitute for customary collection procedures.

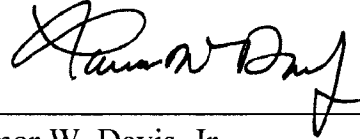
On the contrary, Petitioner conducted a background check on the company and found no record of any judgment against it. Furthermore, Petitioner obtained a list of

creditors from Debtor's general manager and believed that there were no more than seven or eight creditors. Evidence of additional creditors, presented after the filing, does not by itself indicate that the initial filing was made in bad faith. See In re Crown Sportswear Inc., 575 F.2d 991, 992-93 (1st Cir. 1978)(holding that cursory investigation consisting only of conversations with an employee in the credit department who informed petitioner that she had no information as to the number of creditors and obtaining a copy of an assignment for the benefit of creditors is not sufficient to find bad faith filing); In re Race Horses, Inc., 207 B.R. 229, 233 (Bankr. E.D. Okla. 1997)(holding that petitioning creditor conducted an adequate investigation into creditors prior to filing and that was sufficient to provide a basis for good faith filing despite the existence of additional creditors); In re Molen Drilling Co., 68 B.R. 840, 845 (Bankr. D. Mont. 1987)(holding that failure to contact debtor for updated list of creditors and relying on an inaccurate accounts payable ledger and a lien search was not sufficient to show a bad faith filing).

A finding of good faith for purposes of this bond hearing under § 303(e) is not determinative of a later finding under § 303(i). Further evidence regarding bad faith may be discovered and presented to the court in the future through the appropriate motions. However, because Debtor has failed to demonstrate at this point that Petitioner commenced the involuntary bankruptcy in bad faith, the request for bond is denied.

ORDER

IT IS THEREFORE THE ORDER OF THIS COURT that Debtor's Motion
to Require Petitioning Creditor to Post Bond is DENIED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 25 day of November, 2003.

Debtor - South Yacht Corp.
Debtor's Atty. - Herne
Creditor - Mt. Yacht Sales, Inc.
Creditor's Atty. Butler
~~Trustee~~
U. S. Trustee - Berry